



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER OF
PATENTS AND TRADEMARKS
Washington, D.C. 20231

DIW 04-00

Paper No. 6

COPY MAILED

MAY 10 2000

**SPECIAL PROGRAMS OFFICE
DAC FOR PATENTS**

DANIEL M. BECKER
FISH & NEAVE
1251 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10020-1104

In re Application of	:
Worthington et al.	: DECISION DISMISSING PETITION
Application No. 09/311,329	:
Filed: 11 May, 1999	:
Attorney Docket No. BURST-3-CIP1	:

This is a decision on the petition filed on 27 October, 1999, requesting that the above-identified application be accorded a filing date of 14 May, 1999, instead of the presently accorded filing date of 11 May, 1999.

Petitioner alleges that the application was deposited in Express Mail service on 14 May, 1999, and that the United States Postal Service (USPS) made an incorrect "date-in" entry. In support of the petition, petitioner submitted, *inter alia*, (a) a copy of Express Mail receipt No. EL188598031US (the same Express Mail number found on the transmittal letter filed with the original application papers located in the official file) showing a "date-in" of 11 May, 1999; (b) a copy of an "Express Mail" certificate of mailing dated 14 May, 1999, showing the Express Mail receipt number and the docket number for this case, and signed by Susan Snider; (c) a copy of the post card receipt and check for the filing fees, both dated 14 May, 1999; (d) an "Express Mail Order Slip" dated 14 May, 1999, and containing the Express Mail number listed above as well as the docket number for the instant case and purportedly showing that the above-referenced application was received by the USPS on 14 May, 1999, and (e) a filing receipt for the instant application showing a filing date of 11 May, 1999.

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS."

The instant petition lacks items (1) and (3) of 37 CFR 1.10(d)(1). In regards to item (1), petitioner concedes that it received notice of the purportedly incorrect filing date on or about 30 June, 1999, but did not file the instant petition until nearly four months later. As the showing of record indicates a lack of diligence,

petitioner must explain in detail, in its renewed petition, why the instant petition should not be dismissed out of hand as untimely.

In regards to item (3), petitioner has not made an adequate showing that the requested filing date is the date the correspondence was deposited in the Express Mail service. Petitioner has submitted no evidence from the USPS which would corroborate petitioner's assertion, that is, the "date-in" was incorrectly entered by the USPS. The return receipt postcard submitted by petitioner has not been date-stamped by the U.S. Patent and Trademark Office (USPTO) and therefore cannot serve as evidence of receipt of the instant application by the USPTO. Furthermore, the copy of the check for \$3,714.00 dated May 14, 1999, by petitioner is not persuasive because postdated checks may be paid prior to the date indicated on the check.

The "Express Mail Order Slip" is also not persuasive because does not bear any official notation entered by the USPS showing that the application was deposited on the asserted date of deposit. Petitioner may submit with a renewed petition evidence from the USPS, including but not limited to an Express Mail Corporate account Mailing Statement, to establish that the application was deposited in Express Mail on a date other than the "date-in" on the Express Mail mailing label. Alternatively, petitioner should submit evidence that came into being after deposit and within one business day of the date of deposit of the application, including but not limited to a log book with an entry made after mailing, a letter to the client after mailing, or an affidavit or declaration by the person who deposited the application in "Express Mail Post Office to Addressee".

Petitioners should also note that while the requirement of 37 CFR 1.10(d) for a certificate of mailing by "Express Mail" has been waived by the Commissioner,¹ the other requirements of 37 CFR 1.10(d), including the requirement that the correspondence must have the number of the Express Mail mailing label placed thereon prior to mailing, have not been waived. In accordance with 37 CFR 1.10(d)(3), the Express Mail certificate of mailing may not serve as evidence of timely mailing because it was created prior to the deposit of the application in Express Mail.

The petition filed on 27 October, 1999, is not accompanied by the corroborating evidence required by the rule. Accordingly, the petition is dismissed.

¹See 1174 O.G. Pat. Of. 92 (May 16, 1995).

Any request for reconsideration (no further petition fee is required) must be filed within TWO MONTHS of the date of this decision in order to be considered timely [37 CFR 1.181(f)]. The request should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Office of Petitions

By hand: Crystal Plaza 4
Room 3-C23
2201 South Clark Place
Arlington, VA 22202

The application is being forwarded to the Office of Initial Patent Examination for further processing with the presently accorded filing date of 11 May, 1999.

Telephone inquiries specific to this matter should be directed to Petitions Attorney Douglas I. Wood at (703) 308-6918.



Brian Hearn
Senior Petitions Examiner
Office of Petitions
Office of the Deputy Assistant Commissioner
for Patent Policy and Projects